

April 22, 2014

Fred Galante
City Attorney/Housing Authority Counsel
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612

**Re: Your Request for Advice
Our File No. A-14-063**

Dear Mr. Galante:

This letter responds to your request for advice on behalf of the members of the Irwindale City Council and the Irwindale Housing Authority regarding their duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Specifically, you request advice on behalf of Mayor Mark A. Breceda, Mayor Pro Tem Manuel R. Garcia, and Councilmembers Albert F. Ambriz, Julian A. Miranda, H. Manuel Ortiz, and City Manager John Davidson.

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest. Also, the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 72), nor does the Commission advise with respect to past conduct.

QUESTION

Does the “public generally” exception apply to future approvals of amendments to the Disposition and Development Agreement (“DDA”) regarding affordability levels and final approval of the Housing Selection Guidelines describing the qualifications and priority for first time homeowners to secure a home?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

The “public generally” exception will apply to future approvals of amendments to the DDA regarding affordability levels and final approval of the Housing Selection Guidelines so long as the decisions apply equally to all the subject properties. If you determine that, a subject property near an official’s property will be affected in a unique manner (either due to the nature of the decision or the characteristics of the property), the exception would not apply, and you should seek additional advice.

FACTS

The Irwindale City Council also serves as the Irwindale Housing Authority (the “Authority”). The Authority considered and approved a DDA with a low-income housing developer, IMD Enterprises, LLC. The DDA contemplates the development of 18 infill units to be constructed and rehabilitated on seven parcels throughout the City, totaling approximately 98,467 square feet. The DDA properties include a mixture of units for sale to extremely low, very low, low, moderate and potentially some market income households. The seven parcels were initially acquired by the former Irwindale Community Redevelopment Agency and Authority. All properties were then transferred to the Authority in accordance with the Redevelopment Dissolution Law. Two of the parcels contain existing homes that will be rehabilitated. The remaining 16 parcels will be developed as new homes. Some of the parcels are large enough to accommodate more than one unit and will be subdivided as part of the development.

On December 18, 2013, the City Council/Authority approved the DDA and related form Covenant Agreement, which describes the 45-year affordability covenants per state law, and draft Housing Selection Guidelines, which describe the process for the selection of qualified buyers for the DDA properties.² Within the next 60 days, the Authority anticipates approving amendments to the Housing Selection Guidelines and the DDA, as necessary to delineate the final affordability for the units as a whole.

- Each member of the Council/Authority owns his property where he resides. Additionally, the Chair owns one additional property, which is rented to his sister for use as her personal residence.
- One other member also owns and rents out an additional property in the City of Baldwin Park, immediately outside the City of Irwindale. Neither of these two additional rental properties is within 500 feet of any of the DDA properties.

² You noted that the DDA was approved by the full membership of the City Council/Housing Authority, except Mayor/Chair Mark Breceda who was absent on December 18, 2013. As noted above, we do not advise with respect to past conduct. Therefore, nothing in this letter should be construed to evaluate conduct that has already occurred.

The City's Planning Commission and City Council will further review and consider the planning related approvals, including tract maps for four of the parcels. At such time, you anticipate the Planning Commission and City Council will be advised to abstain and not participate on decisions for each property that is within 500 feet of the particular Commissioner or City Councilmember. You believe that the approval of these entitlements can be segregated, unlike the approval of the DDA and Housing Selection Guidelines that pertain to the DDA properties as a whole.

The City has developed approximately 129 affordable housing units throughout the City since 1988. It is not anticipated that development of affordable housing units in the City will affect neighboring properties. The proposed units will be on similarly sized lots as previous affordable and market rate units developed by the former Agency as well as lots privately owned and purchased or developed by existing residents. Namely, the average lots in the City are approximately 5,000 square feet, which is consistent with the lot sizes planned for the DDA properties. Minimal offsite improvements, such as curb and sidewalk improvements, will be required to be constructed by the developer in the areas adjacent to the seven separate parcels.

The City is comprised of approximately 1,454 residents and 390 residential units. There are 375 residential properties within 500 feet of the seven parcels (some of which are counted more than once since some of the 500 foot radiuses overlap), and 224 properties that are within 500 feet of all the subject properties (without double counting).

ANALYSIS

Segmentation

While you did not ask specifically about the segmentation of the decisions in question, we offer the following information on the segmentation process especially as applied to multiple conflicts of interests among multiple members of the body.

As you are aware, Regulation 18709 provides the rules for segmentation of a governmental decision:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

In this case, more than one councilmember has a conflict of interest with respect to different segmented decisions. Under Regulation 18709 (a)(3), the decision in which each official has a conflict of interest must be decided first, before that official can participate in any of the remaining segmented decisions.³

Moreover, with respect to the decision in which each official has a conflict of interest, that official must also: (1) orally identify each type of economic interest involved in the decision as well as details of the economic interest as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

Public Generally Exception

Since you have determined, under the facts presented, that a conflict of interest exists, you ask solely for advice regarding Step 7, the “public generally” exception.

As you are aware, even if a public official determines that his or her interests will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

Under the basic public generally rule, your officials must meet a two-part test by showing that the decision would affect a “significant segment” of the public in “substantially the same manner” as it financially affects your officials’ interest. For decisions that affect a public official’s real property, “significant segment” is defined as 10-percent or more of all property

³ For example, if Smith has a conflict in project A, and Jones has a conflict in project B, before either may vote on project C, both A and B must be decided without their participation. If A is considered first, Smith cannot vote because of his financial interest in A. Similarly, Jones cannot vote on Project A since the decision for which he had the conflict (project B) has yet to be decided. Once A is complete and B is presented for decision, Smith can participate using the segmentation rule. Jones cannot participate by virtue of his financial interest.

owners or all residential property owners in Irwindale, or 5,000 property owners or residential property owners in the city.

You stated that the City is comprised of approximately 1,454 residents and 390 residential units. You also stated that there are 375 residential properties within 500 feet the seven parcels (some of which are counted more than once since some of the 500 foot radiuses overlap) and 224 properties that are within 500 feet of all the subject properties (without double counting).

Based upon the number of residential properties you have identified that are within 500 feet of the DDA properties, it appears that decisions regarding the DDA properties will affect the minimum threshold of ten percent of the property owners as provided in Regulation 18707.1(b)(1)(B)(i).

In the next step, you must also determine whether the financial effect on the significant segment's property will be in "substantially the same manner" as the effect on the property of the officials. For purposes of this analysis, we assume that the DDA amendments will apply evenly to all the parcels subject to the DDA. If this is the case, we conclude that the significant segment you identified will be affected in substantially the same manner as your officials' property interests.

Therefore, we conclude based on your facts and the general nature of the decision, that the public generally exception in Regulation 18707.1 will apply to any member with one single-family residence within 500 feet of property subject to the DDA, so long as that official's property is not unusual in size.⁴

Note that the application of the conflict-of-interest rules must be carried out on a decision-by-decision basis and based on the facts. If the facts change, the advice contained herein may not apply.

⁴ Two of your members are differently situated. The Chair owns a personal residence within 500 feet of DDA property and one additional property that is rented to his sister for use as her personal residence. This additional property is outside 500 feet of DDA property. One other member also owns and rents out an additional property in the City of Baldwin Park, immediately outside the City of Irwindale, but also outside 500 feet of any of the DDA properties. Unless there are facts to suggest these properties or the tenants on the properties will be financially affected, we do not consider them in this analysis.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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